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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARCO SAMAYOA, et al.,

Petitioners,

vs.

CHICAGO BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE
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OCTOBER TERM, 1986

No. 86-1503

MARCO SAMAYOA, ET AL.,

Petitioners,

v.

CHICAGO BOARD OF EDUCATION, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondents the Board of Education of the City of Chicago, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case. That opinion is reported at 798 F:2d

1046, and is set forth in the Appendix to the Petition.

Statement of the Case

Disney School ("Disney") was one of the first magnet schools established in the City of Chicago. (R.App. 1a).[1] It was opened pursuant to an agreement with the United States in 1968, which donated the land for Disney to the Board of Education of the City of Chicago ("Board"). The school operated according to this agreement, selecting by lottery a student body reflecting the racial, ethnic and socioeconomic composition

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[1] The following abbreviations for citations are used in this brief; "R.App." refers to Respondents' Appendix; "Pet.App." refers to Petitioners' Appendix; "Petition" refers to the plaintiffs' Petition for a Writ of Certiorari.

of a designated area located on the north side of Chicago which was the Disney attendance zone. (R.App. 507a).

Plaintiffs' claim, in its present incarnation, is an attack on that admission system as it operated in 1981. It has evolved into its present form, as set forth in the Fourth Amended Complaint, through a series of unsuccessful arguments by plaintiffs. With the failure of each argument, new complaints containing slightly modified allegations have been spawned.

This case was initially brought in 1980 on behalf of black and white students in the Disney attendance area. The first Complaint alleged various wrongs in matters of school administration, such as layoffs of

bus aides, which equally affected all students of all races. The admissions system at Disney was not mentioned or attacked. (R.App. 185a). On August 31, 1981, this original Complaint was dismissed. (R.App. 208a).

Following this dismissal, plaintiffs filed on September 11, 1981 their First Amended Complaint. This complaint challenged the racial/ethnic proportions and admissions policy as implemented at Disney for school year 1981-82, and was based on facts which form the underpinnings of all subsequent complaints in this case. (R.App. 236a).

Student selection at Disney for school year 1981-82 was by lottery that was implemented pursuant to a 1973 Board Report which

pertained solely to selection for attendance at Disney. (R.App. 507a). That Report implemented the agreement between the Board and the United States, set a racial/ethnic enrollment composition for the year 1973, and called for annual revisions in incoming classes at Disney to reflect changes in the racial/ethnic composition of the Disney attendance zone. (R.App. 507a). However, for reasons not of record, the enrollment composition at Disney set in 1973 was not annually revised and continued unchanged until 1981. (R.App. 519a).

In June 1981, the Board reviewed the racial/ethnic enrollment composition for Disney and found that the racial/ethnic composition in its attendance zone varied significantly from the 1973 proportions

still in effect. (R.App. 520a). As a result, a revision in the racial/ethnic composition at Disney was recommended to conform with the 1981 racial/ethnic composition of the Disney attendance zone. (R.App. 520a-521a). Subsequently, racial/ethnic adjustments were made in the composition of the 1981 incoming pre-kindergarten class at Disney to reflect the demographic changes which had occurred in the Disney attendance zone between 1973 and 1981.

However, prior to implementation of the revised racial/ethnic enrollment composition at Disney for school year 1981-82, acceptance letters based upon the 1973 enrollment proportions had been sent to students who had applied for September 1981 classes. (R.App. 420a). Plaintiffs, all 3 and 4

years of age in 1981, had received letters of acceptance for the pre-kindergarten program under the 1973 racial/ethnic proportions. After the 1981 revisions were made they were not, however, admitted to Disney. They were notified of this fact and the reasons for it. (R.App. 422a). Plaintiffs were informed that they could reapply for admission to Disney in following years. (R.App. 422a). But the record contains no evidence that plaintiffs made any subsequent attempts to apply for admission at Disney.

The sole basis for the challenge of the Disney admissions system in the First Amended Complaint was the fact that plaintiffs had initially received acceptance letters to attend Disney. (R.App. 236a). Plaintiffs did not challenge the lottery

admissions system at Disney per se or even the 1981 enrollment compositions per se. Plaintiffs claimed that they had a right to attend Disney because of the acceptance letters they had received prior to the 1981 changes in enrollment composition. They challenged only the specific post-acceptance, pre-enrollment modification which resulted in their exclusion from Disney in 1981. (R.App. 268a).

Analyzing the new claims in plaintiffs' complaint, the district court concluded that, even if the allegations were true, the only available remedy would be a due process hearing from the Board. The court informed plaintiffs that unless the admission system itself were attacked, they could obtain no other relief. (R.App. 268a-270a).

On October 21, 1981, plaintiffs amended their complaint a second time and challenged the 1981 racial/ethnic enrollment composition at Disney.[2] (R.App. 278a). Again, plaintiffs stated that the Disney admissions system and enrollment composition per se were not objectionable. (R.App. 364a). However, after a series of unsuccessful motions for preliminary injunction, plaintiffs were given leave to amend their complaint to challenge the 1981 system per se. (R.App. 369a). On February 2, 1982, the

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[2] A Third Amended Complaint was subsequently filed to show that the 5 and 6 year old plaintiffs, who had been included in the First Amended Complaint, had been admitted to Disney and no longer had any legally cognizable interest in the lawsuit. Accordingly, they were, at that time, removed as plaintiffs. (R.App. 313a). No other relevant changes appeared in this pleading.

Fourth Amended Complaint, which is presently before this Court, was filed. (R.App. 374a).

In 1982, after the events forming the basis of plaintiffs' various complaints had occurred, the Board developed and began implementing a systemwide Desegregation Plan. The Plan was adopted following extensive findings of unlawful segregation in the Chicago Public Schools, first by the United States Department of Health, Education and Welfare (R.App. 5a), and then by the Department of Education's Office for Civil Rights. (R.App. 26a, 43a). These findings culminated in the filing of a complaint by the United States against the Board on September 24, 1980 alleging unlawful systemwide segregation. (R.App. 136a). On the same date, the United States and the

Board entered into a Consent Decree (R.App. 150a), pursuant to which the Board agreed to develop, adopt and implement a constitutional Desegregation Plan.

The Desegregation Plan consists of two major components: a student assignment plan under which students voluntarily transfer from their neighborhood schools to other schools within the system; and the educational components designed to compensate for the effects of past segregation in those schools which remain racially identifiable. United States v. Board of Education of the City of Chicago, 554 F.Supp. 912, 916, 926 (N.D. Ill. 1983). The numerous programs comprising this Plan were approved by the

district court as "clearly... constitutionally acceptable". Id. at 928. The district court retained jurisdiction over the Board's implementation of the Plan, and will do so until the Board has remedied the past segregation in the Chicago Public Schools. Id. at 928.

The Board has successfully implemented the Plan systemwide for the past five years. However, because it is subject to the continuing jurisdiction of the district court, each year the Board must conduct reviews and submit reports to the Justice Department and the court detailing the results of these programs, to ensure further desegregation of the Chicago Public Schools. Id. at 918.

As part of the student assignment plan, the Board has designated 45 schools as

magnet schools. These schools offer special educational programs, are intended to draw students from all areas of Chicago, and are designed to result in cooperative and voluntary desegregation. (R.App. 487a). The Plan requires that all magnet schools maintain a racial/ethnic composition of between 15-35% white, without excluding students already enrolled. (R.App. 506a). As a magnet school, Disney's student racial/ethnic composition must now fall within these uniform guidelines.

For school year 1982-83, in compliance with its Desegregation Plan, the Board replaced the admissions system at Disney which was in effect in 1981 when plaintiffs applied for admission. At that time, the

Board instituted at Disney the Plan's uniform magnet school racial/ethnic composition requirements. (R.App. 525a). This new magnet school enrollment system has not been changed since 1982, and will continue as part of the Desegregation Plan. (R.App. 528a, 531a).

Plaintiffs' Fourth Amended Complaint was dismissed on January 28, 1985. (Pet.App. A37). That dismissal was affirmed by a Seventh Circuit panel (Pet.App. A1), and plaintiffs' motion for rehearing en banc was denied. (Pet.App. A16). Plaintiffs then petitioned this Court for review of that dismissal.[3]

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[3] Except for an intervention attempt, the Board was represented throughout the prior proceedings in this case by different counsel than in the desegregation case.

REASONS FOR DENYING THE WRIT

I.

The Issues Stated In The Petition With Respect To The Implementation Of Pre-Desegregation Plan Enrollment Proportions At Disney Are Inappropriate For Review

Though seeking review of the Seventh Circuit's affirmance of the dismissal of their Fourth Amended Complaint, in their Petition for Certiorari plaintiffs have relied on factual assertions which are not found in that complaint and go far beyond its face. The Fourth Amended Complaint alleges facts consisting solely of the events surrounding plaintiffs' efforts to be admitted to Disney in 1981. However, as each of plaintiffs' arguments in the lower courts reached a dead end, plaintiffs groped for new, unpleaded theories to keep their

case alive. They continue to do so. The present result is a convoluted, internally inconsistent Petition which makes reference to the Desegregation Plan and various other "facts" outside the Fourth Amended Complaint, which are irrelevant to the issue on this appeal from the judgment dismissing that complaint. However, when these extraneous layers are recognized and peeled away, it is obvious that plaintiffs have no valid claim.

Simply stated, plaintiffs' claim is moot. Plaintiffs' 1981 exclusion from Disney's pre-kindergarten program, based upon the post-acceptance, pre-enrollment revision of Disney's racial/ethnic enrollment proportions, was a one-time aberration which will not be repeated. And if not

moot, plaintiffs' claim is bound by facts peculiar to the circumstances existing in 1981, and does not present any important legal issue which would merit this Court's consideration.

A. Plaintiffs' Arguments Are Based On Erroneous Statements of Fact

Plaintiffs' arguments obscure the single most important fact in this case: the admissions system which affected plaintiffs was a pre-Desegregation Plan system unique to Disney. It was superseded by the Desegregation Plan in 1982. The 1981 racial/ethnic proportions plaintiffs complain about were not implemented as part of the Desegregation Plan, but pursuant to a 1973 Board Report relating solely to admissions for Disney. This 1981 admissions system has long since been replaced by the

Desegregation Plan's comprehensive magnet school admissions system. According to the Plan, racial/ethnic composition is only reviewed in terms of whites and minorities (without any subgrouping). It is also governed by a racial/ethnic percentage range which is not subject to revision and which is applied, without excluding students already enrolled, uniformly to all magnet schools, including Disney.

Plaintiffs' exclusion from Disney's pre-kindergarten program in 1981 was thus an aberration due to a one-time, post-acceptance, pre-enrollment revision of the school's racial/ethnic composition pursuant to the pre-Desegregation Plan admissions system. It is simply not true, as plaintiffs have argued in their Petition, that

plaintiffs were affected by an annual revision of a Desegregation Plan quota. To the contrary, they were affected solely by the original 1973 Board Report and, although that Report called for annual revisions, it resulted only in a 1981 change in the enrollment composition at Disney. That was the first, last, and only revision ever made to the enrollment proportions initially established by the 1973 Board Report.

In 1982, the admissions system at Disney was made to conform with the Desegregation Plan. The Plan requires that all magnet schools comply with one set of racial/ethnic enrollment proportions. Because the Plan requires that all magnet schools meet a racial/ethnic attendance range which has been unchanged since the

Plan's inception, and because Disney has complied with this requirement since 1982 and has made no revisions in attendance ranges since then, the situation faced by plaintiffs in 1981 will never be repeated. Their claim is thus limited to a single occurrence and is based upon a long obsolete Board Report.

B. Plaintiffs' Claim Is Moot

Stripped of its incorrect arguments and viewed in the context of the facts alleged in the Fourth Amended Complaint, plaintiffs' claim is clearly moot. A case is moot where the allegedly illegal action ceases, United States Department of Treasury v. Galiato, __ U.S. ____, 106 S.Ct. 2683, 2686 (1986) (case moot where statute amended to eradicate offending provision). This is true in

the case of voluntary cessation where there is no reasonable expectation that the alleged wrong will be repeated. DeFunis v. Odegaard, 416 U.S. 312, 318, 94 S.Ct. 1704, 1706-07 (1974).

A claim is also moot where plaintiffs can no longer be affected by the actions complained of. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 430, 96 S.Ct. 2697, 2702 (1976) (appeal in school desegregation case moot as to students who had graduated and as to their parents); Board of School Commissioners of the City of Indianapolis v. Jacobs, 420 U.S. 128, 129, 95 S.Ct. 849, 850 (1975) (suit challenging school board regulations moot as to students who had graduated). This is true in suits

brought as class actions unless a class has been certified. Id.[4]

Here, the 1981 admissions system was superseded in 1982 by the Desegregation Plan enrollment ranges applicable uniformly to all magnet schools. The 1981 change in racial/ethnic proportions at Disney affected only a few students during a single year. The original magnet program under which this one-time change occurred was experimental and the first magnet program in the Chicago Public Schools. Its replacement, the Desegregation Plan, was designed to be, and has

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[4] Moreover, although plaintiffs' complaints allege that they were brought as class actions, they were never certified as class actions. More importantly, plaintiffs' counsel has conceded that this case is not a class action, and that he represents plaintiffs only in their individual capacities. (Pet.App. 40).

been, a lasting program which is being implemented throughout the system. Given that the racial/ethnic ranges set by the Desegregation Plan and applied at Disney are not subject to revision but will remain unchanged, any 1981 "practice" of excluding previously admitted students cannot be repeated in the future. On this ground, plaintiffs' claim is moot.

Moreover, plaintiffs' claim is moot because they can no longer be affected by the 1981 admissions process for pre-kindergarten classes at Disney. This is the only purportedly illegal conduct asserted in the Fourth Amended Complaint. According to this Complaint, all plaintiffs were allegedly 3 and 4 years old in 1981. Thus, they are now 9 and 10 years old, and are

clearly ineligible for admission to Disney's pre-kindergarten program under any set of circumstances.

C. Plaintiffs' Claim Is Fact Bound And Presents No Important Legal Issues

Because plaintiffs' challenge to the 1981 admissions process in their Fourth Amended Complaint fails to raise legal issues of sufficient importance to merit consideration by this Court, the Petition should be denied. As plaintiffs concede in their Petition, they are not attacking the Disney admissions system per se. (Pet. 16). Rather, plaintiffs' entire claim, as pleaded, is based on a purported one-time error in implementation of Disney's 1973 admissions system, which is no longer in effect, resulting in plaintiffs being

accepted but not admitted to Disney's pre-kindergarten program.

In sum, this claim is unique to these few plaintiffs. It is based on an aberration concerning implementation of a superseded selection process at Disney which can not recur or affect other members of the public. Quite simply, plaintiffs' only claim in the Fourth Amended Complaint is bound by facts peculiar to them at a single place and time and does not raise issues of sufficient importance for consideration by this Court.

II.

All Remaining Issues Raised In The Petition Concerning The Desegregation Plan Are Also Inappropriate For Review

The several courts which have considered plaintiffs' claims since implementation of the Desegregation Plan have wrongly assumed that the claims also encompass the magnet school enrollment ranges imposed by the Plan. The perplexing question is how these courts ever reached such a conclusion, and how this case ever reached this Court under that theory.[5] The Fourth Amended

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[5] Plaintiffs' assertions concerning the Plan or its enrollment ranges appear to have first been expressed orally and by motion in November 1983 (see and compare R.App. 443a and 482a), and in their November 1983 Motion to Intervene in the independent proceeding concerning the constitutionality and implementation of the Plan. (R.App. 439a, 447a). This occurred long after the

(Footnote continued on next page)

Complaint remains focused upon 1981 pre-Plan enrollment proportions. It asserts only that in 1981 plaintiffs applied for, were admitted to, and were then excluded from Disney by operation of these superseded enrollment proportions. (R.App. 374a). Nothing in this complaint or the Petition provides a legal basis for recasting this moribund claim concerning displaced, Disney specific enrollment proportions into a constitutional attack upon the Board's Desegregation Plan and its use of magnet

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(Footnote continued from previous page) Fourth Amended Complaint was filed in February 1982, and long after the Plan had been approved in January 1983. Based upon plaintiffs' present complaint, the issue of Plan enrollment controls is not even properly before this Court and should not be considered by it.

school enrollment controls generally or their use at Disney in particular.[6]

A. Plaintiffs Lack Standing To Challenge Any Aspect Of The Desegregation Plan

Nothing in the Fourth Amended Complaint, however liberally construed, alleges or suggests that plaintiffs have the requisite standing to challenge the Board's Desegregation Plan and its use of enrollment

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[6] As noted before, plaintiffs have never amended their Fourth Amended Complaint. That complaint focuses upon the 1981 pre-Plan proportions. Plaintiffs have made belated and post-complaint assertions about the Plan and the Plan's magnet schools enrollment ranges solely in motions or briefs. Thus, they managed to confuse the district court and the Court of Appeals into believing that the complaint, and their case, involved in some manner the Board's 1982 and ongoing Desegregation Plan. Like a compass error in navigation, this misguiding has caused the case to arrive in this Court under a theory never pleaded, and not legally cognizable.

ranges at Disney or its other magnet schools as a technique for desegregating the Chicago public schools.[7] As the Court has recognized, plaintiffs must assert facts demonstrating that they have been personally harmed by the practices which they are challenging. It is not sufficient that these practices may have or will in the future harm any class of which plaintiffs are a member or purport to represent. Warth

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[7] Standing is, of course, a constitutional limitation upon the jurisdiction of all federal courts. Since it is the predicate for the power of a court to act, it must exist at all stages of a proceeding. It may be raised at any time. See e.g., DeFunis v. Odegaard, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707 (1974); Safir v. Dole, 718 F.2d 475, 481 (D.C. Cir. 1983), cert. denied, 467 U.S. 1206, 104 S.Ct. 2389 (1984). Hence, it is not relevant that neither the district court nor the Court of Appeals considered this issue, nor that the Board raises it for the first time in this Court.

v. Seldin, 422 U.S. 490, 498-508, 95 S.Ct. 2197, 2205-2210 (1975); see also, Fisher v. Tucson School Dist. No. One, 625 F.2d 834, 837 (9th Cir. 1980) (parents of school children had no standing to challenge "Phase II" of desegregation plan where there was no allegation that their children would be affected by that phase).

Plaintiffs here have never asserted that they applied or reapplied for admission to Disney or any other magnet school after 1981. Thus their claims, or alleged harms, date from prior to the time that the uniform Desegregation Plan enrollment ranges at all magnet schools superseded the Disney-specific racial/ethnic proportions which are the subject of the Fourth Amended Complaint.

Nor do plaintiffs allege that they were excluded from Disney, or any other magnet school or Chicago public school, because of the enrollment ranges established by the Board's Desegregation Plan. Moreover, plaintiffs do not claim that they sustained any harm whatsoever after the Plan was implemented, or as a result of its implementation. In fact, it is not alleged that these plaintiffs have even resided in the Chicago public school district since school year 1981-82, and after the Plan was implemented. (R.App. 374a).

Plaintiffs plead no facts showing that they were affected by the Desegregation Plan or any practices related to it. Absent allegations that they were injured by the

enrollment ranges established by the Desegregation Plan in 1982, and first applied in school year 1982-83, plaintiffs lack the standing necessary to challenge the Board's use of the uniform magnet school enrollment ranges generally since that date. They also lack standing to challenge their use at Disney in particular.

B. Plaintiffs' Fourth Amended Complaint Was Correctly Dismissed

Any claims in the Fourth Amended Complaint relating to the constitutionality of the Board's Desegregation Plan were properly dismissed for two reasons. First, the district court and the Seventh Circuit lacked subject matter jurisdiction to consider, in this case, any issues concerning the Desegregation Plan. Those questions

were already before a different court with continuing jurisdiction over the Plan's implementation. Second, even if the exercise of jurisdiction over plaintiffs' collateral action was correct, the district court and the Court of Appeals rightly concluded that the plaintiffs' claims should be dismissed under the rationale of Johnson v. Board of Education, 567 F.Supp. 290 (N.D. Ill. 1983) ("Johnson III").

1. The District Court and The Seventh Circuit Had No Jurisdiction To Adjudicate Plaintiffs' Claims Concerning The Desegregation Plan

Since 1980 and to the present, continuing jurisdiction over the development, approval, and implementation of the Board's Desegregation Plan has resided in a district court other than the court presiding over

this case.[8] By challenging the constitutionality of the Board's Plan, or particular aspects of it in their Petition, plaintiffs boldly ignore the judgments and continuing jurisdiction of that different court. Any judgment entered in plaintiffs' favor would have overruled or interfered with the jurisdiction of the court retaining control over the Plan, and seriously disrupted the implementation of the Plan itself.

It is well established that a separate suit seeking to attack a desegregation plan

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[8] The Board does not wish to belabor the point, but it is an important one. As stated before, the Fourth Amended Complaint's allegations are based solely upon a pre-Desegregation Plan admissions system. Plaintiffs' arguments relating to the Desegregation Plan or any aspect of it are raised only in their November 1983 Motion to Intervene, their briefs in support of that motion, their appellate briefs and their Petition to this Court.

committed to the jurisdiction of a different court should be dismissed. Courts have consistently recognized that one school district cannot be subjected to competing desegregation plans or imperatives, and that administration over any desegregation plan must be centralized in a single court. They have also held that the court with prior and continuing jurisdiction over the desegregation plan is the only proper forum with the power to entertain objections to the plan.

In one leading case, Hines v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1973), the court upheld the lower court's dismissal of an independent class action suit which challenged pupil assignments made in compliance with the desegregation orders

of a separate court. According to that court

> In resolving this appeal, this court must attempt to set out a method which allows parent groups to present their complaints about the school system which results from a desegregation order without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle.
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> *********
>
> [T]he proper course of parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in the prior action.

479 F.2d at 765.

To avoid contradictory results, and the implicit invitation to critics of a desegregation plan to seek a new court to undermine all or part of that plan, courts have repeatedly followed this principle. They have

dismissed independent suits and required plaintiffs to intervene in the main desegregation case. Miller v. Board of Education of Topeka, 667 F.2d 946 (10th Cir. 1982); Burns v. Board of School Commissioners of City of Indianapolis, 437 F.2d 1143 (7th Cir. 1971); Black and White Children of the Pontiac School System v. School District of the City of Pontiac, 464 F.2d 1030 (6th Cir. 1972); Spangler v. Pasadena City Board of Education, 552 F.2d 1326 (9th Cir. 1977); Hayes v. McMillan, 418 F.Supp. 116 (N.D. Tex. 1976), aff'd, 560 F.2d 204 (5th Cir. 1977); Brookins v. South Bend Community School Corp., 95 F.R.D. 407 (N.D. Ind. 1982), aff'd, 710 F.2d 394 (7th Cir. 1983), cert. denied, 466 U.S. 926, 104 S.Ct. 1707

(1984) (treating separate lawsuit challenging aspects of desegregation plan as motion to intervene).

In this case, neither the district court nor the Court of Appeals had the power to entertain plaintiffs' independent, collateral suit purporting to attack the Board's Plan. While plaintiffs did move to intervene before Judge Shadur in the main desegregation case (R.App. 439a), that motion was denied (R.App. 485a). Plaintiffs' sole recourse at that point was to appeal the denial of intervention. Burns v. Board of School Commissioners of Indianapolis, 437 F.2d 1143, 1144 (7th Cir. 1971); Hines v. Rapides Parish School Board, 479 F.2d 762, 765-766 (5th Cir. 1973).

After their Motion to Intervene was denied, the district court should have dismissed those separate and collateral claims in which plaintiffs purported to attack the Desegregation Plan, and forced them to appeal the denial of intervention in the main desegregation case. Concomitantly, the Seventh Circuit erred in reviewing plaintiffs' collateral attack on the Plan, and not dismissing this case for lack of subject matter jurisdiction.

Since this Court similarly lacks jurisdiction over those aspects of the Fourth Amended Complaint challenging the Plan itself, the Petition should be denied on that ground alone.

2. Dismissal of Plaintiffs' Claims Directed At The Desegregation Plan Was Correct Under The Rationale Of Johnson v. Board Of Education Of The City Of Chicago

This case was also dismissed by the district court on the ground that plaintiffs' challenge to the present enrollment system at Disney constituted a piecemeal collateral attack on one component of the Desegregation Plan which was barred by the reasoning of Johnson III. In affirming that dismissal, the Seventh Circuit also adopted the rationale in Johnson III.

Contrary to plaintiffs' contentions in their Petition, no court has held that plaintiffs were collaterally estopped from attacking the enrollment system at Disney established by the Desegregation Plan. Johnson III is not about collateral estoppel

at all. Rather, Johnson III is a careful, thoughtful decision concerning the nature of desegregation plans and how they work. As Judge Shadur recognized in Johnson III, an effective and constitutionally adequate desegregation plan is always comprised of numerous interrelated race conscious techniques. As an integrated whole, these techniques are intended to achieve the purpose of systemwide desegregation. It is not constitutionally significant that one technique at one school, viewed alone, involves a racial classification so long as the plan, as a whole, does not burden impermissibly any particular racial group.[9]

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[9] This proposition is so well established that it is axiomatic in considering the constitutionality of a desegregation plan. Implicit in this analysis is that a
(Footnote continued on next page)

Because the Board's desegregation plan, as a whole, had previously been found "clearly... constitutionally acceptable", 554 F.Supp. at 928, the court in Johnson III dismissed a claim, much like that of these plaintiffs, attacking controlled enrollment policies at two schools only. It held that, in the context of a constitutionally

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plan cannot be parsed to a technique-by-technique, school-by-school, or student-by-student analysis to determine constitutional acceptability. See e.g., Keyes v. School District No. One, 521 F.2d 465, 479 (10th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S.Ct. 806 (1976); Higgins v. Board of Education of Grand Rapids, 508 F.2d 779, 794 (6th Cir. 1974); Davis v. Board of Education of Little Rock, 674 F.2d 684, 687 (8th Cir. 1982), cert. denied, 459 U.S. 881, 103 S.Ct. 178 (1982); Adams v. United States, 620 F.2d 1277, 1296 (8th Cir. 1980); Tasby v. Wright, 585 F.Supp. 453, 455 (N.D. Tex. 1984), aff'd, 771 F.2d 849 (5th Cir. 1985); Arthur v. Nyquist, 473 F.Supp. 830, 840 (W.D. N.Y. 1979). Viewed microcosmically, few if any plans could ever pass such constitutional muster.

approved plan, a challenge to one facet of the plan could not state an equal protection violation.

> [T]his Court's approval of the Plan in the Opinion and the Judgment must preclude attacks on separate facets of the Plan, taken in isolation. Approval of the Plan as a whole implicates rejection of the notion each and every element of the Plan must pass strict constitutional scrutiny in a vacuum, isolated from the other aspects of the Plan. That is because the whole really is more than the sum of its parts: The whole Plan desegregates the school system by techniques that individually classify by race and that individually (that is, if a particular technique were the only ingredient in the game plan) might be impermissible under the Constitution.

567 F.Supp. at 296 (emphasis in original).

The court in Johnson thus concluded that challenges to individual aspects of the plan alone constituted "collateral attacks" upon a plan that had already been found constitutional. Id. Its reasoning was

straightforward and sensible: since only from the perspective of the whole plan can a court determine whether one of a multitude of techniques is constitutional and contributes to desegregating an entire school system, individualized attacks must necessarily implicate a challenge to the entire plan, all of its techniques and its overall distribution of racial burdens.

Given the systemwide nature of desegregation plans and their various techniques and components, no other approach could be constitutionally proper or feasible because most components involve racial classifications. Extracting for analysis a single plan component means nothing constitutionally. Where a desegregation plan as a whole is constitutionally acceptable, a particular

technique operating in combination with other techniques presumptively contributes to achieving the purpose of systemwide desegregation.

This conclusion makes good sense and is good law. If constitutional violations could be shown because of racial classifications on a technique-by-technique, or school-by-school basis, a constitutionally permissible desegregation plan would be constantly subject to court challenge and possible erosion. Thus, individuals like these plaintiffs could overturn by piecemeal attack at a later date the whole of a constitutionally acceptable desegregation plan by selectively attacking each component.

In this case, plaintiffs' assertions concerning magnet school enrollment ranges

established by the Desegregation Plan at Disney and other schools are nothing more than a collateral attack on an isolated component of a constitutionally acceptable desegregation plan. Stripped from the Plan and viewed in isolation, whether a particular race conscious remedy contributes to the purpose of the Plan as whole cannot be determined. As in Johnson III, because the attack in this case is piecemeal and does not consider the whole Plan, no cause of action exists. Any other result would cripple effective implementation of even the most unintrusive desegregation plan.

III.

In The Context of Its System-Wide Desegregation Plan, The Board's Use of Uniform Enrollment Ranges At Disney And All Other Magnet Schools Was Constitutionally Permissible

Since 1982, the Board has been implementing a systemwide desegregation plan to eliminate the wide-spread effects of past segregation in its schools. Plaintiffs have asserted in their Petition that they and all other Chicago public school students are entitled to admission at any magnet school, including Disney, according to a race neutral selection process. This argument ignores that magnet schools are well accepted desegregation techniques and that magnet school enrollment controls are an often used and essential device to ensure

that such schools become and remain integrated. The propriety of student enrollment controls at magnet schools is so well settled and in accord with this Court's prior desegregation decisions that it does not merit this Court's review.

As presented to and approved[10] by the district court, the Desegregation Plan incorporated the use of several interrelated student assignment techniques, including

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[10] The district court's approval of the Plan was not appealed by the United States nor any other person or organization. In the approval process, the district court considered not only the Board's position, but also considered thoroughly the contentions of the United States and several amici curiae organizations representing diverse interests. 554 F.Supp. at 915 and 915 n.3. This unappealed approval reflects the soundness of the Plan and the court's decision and includes, of course, the magnet school provisions in the Board's Plan. Id. at 917.

magnet schools with enrollment ranges, to maximize stably integrated education in the heavily minority Chicago public schools, and to attract white children to predominantly minority schools in minority neighborhoods. In approving the Plan, the district court necessarily concluded that, in this case, the Board's magnet school enrollment ranges were a legitimate and constitutional method of achieving desegregation. 554 F.Supp. at 928.

For the Board, use of a magnet school component is essential to the success of its Desegregation Plan. Its magnet schools are intended to stimulate voluntary, desegregative student transfers. (R.App. 487a). Magnet school components are, moreover, a well-recognized technique for desegregating

a public school system. Liddell v. State Of Missouri, 731 F.2d 1294, 1310-11 (8th Cir. 1984), cert. denied, 469 U.S. 816, 105 S.Ct. 82 (1984) (stating that magnet techniques are used in "at least eighteen cities" and noting ten desegregation decisions approving the use of magnet techniques); 20 U.S.C. § 1713(f).

Legal justification for the use of magnet schools with attendant enrollment ranges, such as the Board's, is clearly found in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 27-28, 91 S.Ct. 1267, 1281-82 (1971), its companion cases[11] and their progeny.[12] Swann and its

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[11] North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 1286 (1971); McDaniel v. Barresi, 402 U.S. 39, 40-41, 91 S.Ct. 1287,
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progeny teach that in the context of a systemwide desegregation plan, no student has a right to attend any particular school or to be admitted to a school absent consideration of the school's racial composition and whether that admission will advance or

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(Footnote continued from previous page) 1288-89 (1971) (applying Swann principles in the context at a voluntary desegregation plan).

[12] Lower court decisions are uniformly in accord with this Supreme Court precedent. See e.g., Keyes v. School Dist. No. One, 521 F.2d 465, 478 (10th Cir. 1975) cert. denied, 423 U.S. 1066, 98 S.Ct. 806 (1976); Norwalk Core v. Norwalk Board of Education, 298 F.Supp. 213, 223-225 (D. Conn. 1969), aff'd, 423 F.2d 121, 124 (2d Cir. 1970); National Association v. Board of Public Education, 497 F.Supp. 471, 477-478, (N.D. Pa. 1980); Davis v. Board of School Commissioners of Mobile, 393 F.2d 690, 694 and 694 n.5 (5th Cir. 1968); Tasby v. Wright, 542 F.Supp. 134, 136-138 (N.D. Tex. 1982), remanded, Tasby v. Wright, 713 F.2d 90, 97 (5th Cir. 1983); Booker v. Special School District No. 1, 585 F.2d 347, 354 (8th Cir. 1978), cert. denied, 443 U.S. 915, 99 S.Ct. 3106 (1979).

retard desegregation of the school and of the system as a whole. Because the Board is implementing a court approved, systemwide desegregation plan, the preference of these plaintiffs to attend Disney or any other school with a particular racial balance, or to be selected or assigned without regard to race, must yield to the overall purpose of desegregation.

Several courts have also recognized that Swann principles apply to magnet schools. They have held that enrollment ranges, like those imposed by the Board's plan, are necessary to ensure that "voluntary" transfers to magnet schools do not create a segregated magnet school or a dual system of elite schools. The First Circuit, for example, specifically approved

the use of racial quotas in admissions to magnet schools.

> Fundamentally, the magnet schools, in order to prove of value to the desegregation plan, had to be carefully circumscribed [by enrollment quotas] to ensure that they would not serve as a haven for those seeking to attend a school predominantly composed of those of their own race.

Morgan v. Kerrigan, 530 F.2d 401, 423 (1st Cir. 1976), cert. denied, 426 U.S. 935, 96 S.Ct. 2648 (1977)[13].

These decisions thus state the obvious. No student has a right to attend a magnet school of "special quality." Rather, a student has a right only to attend a

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[13] Accord, Davis v. East Baton Rouge Parish School District, 721 F.2d 1425, 1440 (5th Cir. 1983) (following Morgan v. Kerrigan); United States v. Mississippi, 622 F.Supp. 622, 628 (S.D. Miss. 1985); Tasby v. Wright, 520 F.Supp. 683, 745 (N.D. Tex. 1981).

school of adequate quality. When magnet schools are used as a part of a systemwide plan to encourage voluntary desegregation, the purpose of desegregation, rather than providing a specialized curriculum, is the paramount objective. Swann principles concerning student assignments apply equally to all schools in a desegregating school district, including magnet schools. They must do so to ensure that magnet schools work as effective desegregation devices. Under Swann, no student in the context of a desegregation plan has a right to attend a magnet school based on race neutral criteria. To accept plaintiffs' contrary proposition would require this Court to overrule Swann, and exempt from desegregation principles one of the most effective means to engender cooperative

desegregation in public schools.

There is nothing novel, peculiar, or discriminatory about the Board's magnet school enrollment ranges or their use at Disney. The standard enrollment ranges established at Disney and the other magnet schools by the Board's desegregation plan are clearly in accord with the types of ranges uniformly approved by the courts in other school desegregation cases. Given this court's established precedent in Swann, and consistent lower court approval of enrollment ranges at magnet schools, plaintiffs' contentions concerning a "right" to attend Disney, without regard to race, state no unsettled issues which merit this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari ought to be denied.

Respectfully submitted,

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